

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of Phelps Harbor
Excavation and Breakwater
Construction, Permit Application
No. 95-1229, Leech Lake, Cass County

FINDINGS OF FACT
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on April 17, 1996, in Walker, Minnesota.

Appearing on behalf of the Applicant herein, Joseph D. Phelps, was Paul Phelps, Attorney at Law, 1560 Beam Avenue, Suite A, St. Paul, Minnesota 55109. Appearing on behalf of the Department of Natural Resources was Cheryl W. Heilman, Assistant Attorney General, Suite 990, 445 Minnesota Street, St. Paul, Minnesota 55101-2127.

The hearing in this matter lasted two days, and the record closed at the end of the hearing on April 18.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of the Department of Natural Resources shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with the Commissioner.

STATEMENT OF ISSUE

Has the Applicant met all of the conditions required for the grant of a permit to construct an inland harbor on Leech Lake?

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural History

1. In March of 1995, Joseph D. Phelps initiated contact with the Department's Bemidji regional office regarding the construction of a harbor on his property on the south shore of Leech Lake. On March 21, 1995, he executed a Water Resource Project Notification/Application Form. Initially, it was Phelps' desire to excavate inland of the

existing shoreline to create an "all-in" harbor, which had only a 20-foot mouth into the lake. However, after discussions with Nate Dalager, a Department employee, Phelps pursued an "all-out" alternative, whereby the harbor would be placed lakeward of the shoreline. After being told that this alternative was not likely to be approved, Phelps proposed a "half-out, half-in" alternative. Exhibit 1 is Phelps' application form, which bears a date stamp of April 19, 1995 at the Bemidji office. It was accompanied by a drawing, labeled as Exhibit 2, which shows the "half-out, half-in" alternative. At the hearing, Phelps made it clear that he would build the harbor in any configuration which the Department would agree to, but his first choice is an "all-in" design.

2. On May 17, 1995, the Army Corps of Engineers indicated that the proposed work was authorized by General Permit GP-001-MN. Ex. 3.

3. On June 2, 1995, Rob Naplin, of the Department's wildlife section, responded to an inquiry from Nate Dalager indicating that the proposal presented no wildlife impacts, and that Naplin recommended approval for an "all-in" harbor. Ex. 4.

4. On June 14, 1995, Harlan Fierstine, the area fisheries supervisor in Walker, prepared a memo to Dalager indicating that he preferred that alternatives be pursued rather than granting a permit for a harbor. He recommended a shore tracker system. He went on to indicate that if an alternative could not be required, then he would approve a permit for a "all-in" harbor with certain conditions. The basis for his concern was described as preservation of walleye and white sucker spawning habitat, as well as reducing the "quiet water" created by a harbor. Ex. 5.

5. On July 12, 1995, Gerald L. Paul, the regional hydrologist in Bemidji, sent a formal letter of denial to Phelps. The letter indicates that the Department's rules protect significant fish and wildlife habitat, and that the rocky shoreline at the site of the proposed harbor provides excellent spawning habitat for walleye and white sucker. In addition, the Department noted the "quiet water" effect which allows for the propagation of bullheads, bass, sunfish and crappies which compete with walleyes, pike and muskellunge. The letter noted that the construction of harbors permanently altered the natural character, appearance, and stability of the shoreline. The letter suggested that less impact on the environment would be caused by alternatives, such as boat lifts, shore tracker systems, and use of existing harbors. It concluded that these alternatives were reasonable, and thus the application was denied in all respects. Ex. 6.

6. On August 9, 1995, Phelps filed an appeal from the denial, along with the necessary fee. Ex. 7.

7. On March 12, 1996, the Commissioner issued his Notice of and Order for Hearing, setting the hearing in this matter for April 17 in Walker. The Notice was published in the Pilot-Independent, a qualified newspaper in Cass County, on March 21 and March 26, 1996. Ex. 9.

The Need for a Harbor

8. Joseph Phelps, the Applicant herein, is currently 68 years old. His parents first bought the Leech Lake property in 1934. His parents had five children, two of whom own parcels of the property in question. Joseph Phelps is one, while the other is Dr. James Dunlevy, who is married to the sister of Joseph Phelps. If one considers the

parents to be the first generation, there were five children in the second generation, 20 children in the third generation, and "many children" in the fourth generation. Joseph Phelps is 68 years old, while James Dunlevy is 70 years old.

9. For many years, the Phelps (hereafter, the term "Phelps" includes the Dunlevys and other family members who use the property) have used a makeshift ramp with wooden boards to help them haul their boats up onto shore. However, as Joseph Phelps and Dr. Dunlevy have grown older, they find it harder and harder to push the boats down, and then pull them up, the ramp. This is particularly difficult during times of high wind and waves, and the older Phelps now have to stay ashore on some days when they would have been able to go out some years ago.

10. Leech Lake is a very large lake, one of the six or seven largest in the State. It has an area of approximately 110,000 acres, a maximum depth of 150 feet, and a shoreline length of 195 miles. It has an irregular shape, with numerous large and small bays. Nearly 50% of the shoreline is comprised of a gravel-rubble-boulder mixture, nearly all of which is accessible for use by spawning walleye.

11. The Phelps' property is small. It includes 728 feet of shoreline, part of which is owned by the Joseph Phelps family, and part of which is owned by the Dr. James Dunlevy family. The Phelps own roughly two-thirds of the property, while the Dunlevys own one-third, with the Phelps' lying immediately west of the Dunlevys'. There are two cabins on the Phelps' property, and one on the Dunlevy property. The proposed harbor would serve all three cabins. The zoning in this area would allow for seven lots to be created on the combined Phelps/Dunlevy property.

12. The property is on a shoreline that runs east and west. It does not abut a bay of the lake (of which there are many), but rather abuts the main body of the lake. To the north/northwest of the property is Stoney Point, which is approximately four and a half miles across the lake. Directly north of the property is Otter Tail Point, which is approximately seven and one-half miles across the lake. The greatest length across the lake is to the northeast, to the northeast end of Waboose Bay, which is approximately 17 miles.

13. Hibbing, which is approximately 125 miles away, was the nearest site for which wind data was offered into the record. That distance suggests that applying Hibbing data to the Phelps location must be done with care. The Hibbing data suggests that during the months of May, June, July, August, and September, the winds are generally from the northwest and south/southeast. Ex. 34. Winds from the south/southeast are not a problem for boat use at the Phelps property. However, winds from the northwest are a problem. Exhibit 21 consists of five photographs, put together by the Phelps from photographs taken over the years, showing some of the worst wave action which the property experiences. The Phelps readily admit that Exhibit 21C, for example, is so windy that they would not attempt to go out onto the lake regardless of whether they had a harbor or not. Weather such as that shown on Exhibit 21C only occurs once a month. But weather such as 21B, showing what was described as a "good walleye chop", occurs roughly 25% of the time during the summer months. Both Dr. Dunlevy and Joseph Phelps indicated that they would like to be able to fish in weather such as that shown in Exhibit 21B, but both indicated that they could no longer

get a boat in and out using their current makeshift ramp unless they had one or two younger people to help them. They contrasted this situation with earlier years, when they were able to get boats in and out without help.

The Proposed Solution

14. The Phelps' first preference would be an "all-in" harbor that would hold five boats. There would be three boats for the Phelps family, and two for the Dunlevy family. The Phelps boats would be all fishing boats, while the Dunlevy boats would include one fishing boat and one sailboat. The proposed harbor would be roughly 75 feet by 60 feet, with a 20-foot "mouth" onto the lake. These dimensions are reasonable given the boats under consideration. The harbor would be compatible with the shoreline, and the surface area would be minimized in relation to the number of boats sought. There are many harbors along the shore of Leech Lake, and Exhibits 24-31 illustrate some of them located near the Phelps' property. They are not visually intrusive or aesthetically destructive.

15. The shoreline along the Phelps property is characterized by two features which affect the possible location of a harbor. The first is the fact that there is a substantial hill paralleling most of the shoreline, with the exception of one location, roughly in the center of the property, where the hill is not present, either because of some natural phenomenon (erosion) or artificial activities many years ago. It is not clear which caused this cut in the hill, but it is a very noticeable feature that suggests the logical location for a harbor. The second feature which suggests the location is the nature of the shoreline. On either side of the break in the hill, there are large boulders. In fact, the entire shoreline (with that exception) consists of large rocks and boulders. At the point of the break in the hill, however, the shoreline is made up of small pebbles and rocks. The boulders which occur elsewhere are not present. This area is known as the "swimming beach", and serves all three cabins. It is where the Phelps erect a dock each year, and where they launch their boats. It is also the logical location for a harbor. The Phelps propose to place their harbor just to the east of the swimming beach. The hillside and boulders would realistically prevent it from being placed far away from that location.

16. The swimming beach is 25-30 feet wide, but the area to the east is useable (for another 40 feet, or so) for a harbor and some alternatives.

The Problems With A Harbor

Destruction of Spawning Habitat

17. Walleye, northern pike, and muskellunge are the principal game fish in Leech Lake. They are found in varying abundance throughout the lake. Yellow perch are also abundant, and provide the primary forage for walleye and northern pike. Also present are white suckers, lake whitefish, bullheads, bluegills, large mouth bass, and black crappies. Leech Lake is a popular walleye, northern pike and muskellunge fishing lake. During the summer of 1991, an estimated 306,585 angler-trips, amounting to 1.2 million angler-hours, occurred on Leech Lake. Those anglers harvested nearly 200,000 pounds of walleye, and 100,000 of northern pike. The total harvest has remained virtually unchanged since the mid-'60s, but total angling pressure has increased by

approximately 43%. Ex. 19: 1994 Large Lake Sampling Program Assessment Report, at pp. 1-3. The walleye production on Leech Lake has been stable since the mid 1960s, although reliable data is only available since 1984. Anecdotal evidence suggests the walleye population has been stable since the 1940s.

18. Walleye spawning is most successful in rubble and gravel having interstitial cracks where the eggs can be protected from excess motion and predators. While spawning is successful on large boulders and in sand, it is not as desirable as the rubble and gravel locations. Mud is the worst.

19. The area in front of the Phelps property, including the 20 feet proposed to be excavated for the mouth of the harbor, is of the type where walleye spawning is successful. During a May 1995 inspection, white sucker were seen spawning all along the shoreline where the harbor is proposed to be placed, and it is highly likely that this same area would also be used by spawning walleye. Ex. 5. In 1962, Dennis Schupp, a Department employee, traversed around the lake, looking for walleye eggs. While he did not happen to inspect the Phelps property, he did inspect properties on either side of it. These properties had the same general shoreline characteristics as the Phelps property. Schupp found walleye eggs at each of the two properties near the Phelps site, and it is virtually certain that walleyes do spawn at the Phelps site. Ex. 13 and 14. However, it is not posted as a protected spawning area. There are no posted walleye spawning areas at Leech Lake.

20. The amount of habitat which would be disturbed by the harbor mouth, however, is minuscule in comparison to the amount of similar habitat around the lakeshore. It is estimated that roughly 50% of the 195-mile lakeshore is made up of the rock and rubble habitat most desirable for walleyes. Twenty feet out of some 500,000-plus feet of suitable habitat is de minimus.

21. Spawning habitat is not the limiting factor to walleye population in Leech Lake. The limiting factor is food. Walleyes, northerns and muskies must compete with other fish for food in Leech Lake. Ex. 11 and Testimony of Stevan Phelps.

Creation of Quiet Water

22. The second major basis for the Department's denial was that creation of a harbor leads to "quiet water" which encourages the propagation of fish which compete with walleyes for food. This occurs because a harbor environment is like a small water-body which is quiet in the sense that it has fewer waves. Sediments tend to settle in the bottom, along with organic debris. This results in a soft bottom with increased aquatic vegetation compared to a non-harbor environment in the same locale. The water quality usually shows increased phosphorus, water temperature, and greater oxygen depletion near the bottom. All of these conditions favor the propagation of bullheads, black crappies, and bass. These fish not only eat walleye eggs, but they also compete with walleyes for food. Harbors also encourage the propagation of perch, but perch are forage for walleyes, and so not a concern. Ex. 16.

23. Harbors are not the only places that encourage the propagation of walleye competitors. Bays also do the same thing. Near the Phelps property, to the west, is Uran Bay. To the east is Rogers Bay. These bays are much larger than the harbor that

would be created by the Phelps. The impact of the Phelps Harbor on walleye competition for food is insignificant and de minimus. The only way in which it can be viewed as significant is as part of the cumulative impact of numerous harbors around the lake.

24. There is no evidence in the record to suggest how many harbors on Leech Lake are too many. The 1989 Hugill Report on Lake Mille Lacs documented the fact that the fish found in harbors were different from the fish found in the main lake, and led to the conclusions regarding bullheads, black crappies and bass noted above. That report indicated Hugill's "heightened concern" that the cumulative effects of artificial ecological modifications may increase the proliferation of undesirable fish species. It noted, however, the following:

The direct impact of harbors and other habitat alterations on the Mille Lacs Lake fish population was beyond the scope of this limited study. With over 126 harbors, breakwaters and boat slips now in existence around Mille Lacs, the lake's natural shoreline character has obviously been impacted. The slow proliferation of these structures over the past 50 years has had a continuum of impacts that would be extremely difficult to measure. Further development adds to the continuum, making individual harbor impacts nearly impossible to measure. Some point in development exists, or has occurred, where the lake's natural species assemblage will be impacted, but the when and how is not measurable at present.

There exists the same uncertainty about the cumulative impact of harbors on Leech Lake -- there is no evidence in the record (other than Harlan Fierstine's concern) to demonstrate that the harbors are impacting Leech Lake.

Alternatives to the Proposed Harbor

25. In the letter of denial, the Department identified a number of alternatives to the proposed project, concluding that at least some of them were reasonable and represented a "minimal impact solution". The primary focus was upon a boat tracking system, with occasional use of neighboring resort harbors when the weather was too bad for the boat tracker.

26. During the hearing, most of the attention focused on a boat tracking system known as the "Shore Tracker Marine Railway System". This system begins with a cradle, large enough to hold a boat. The cradle rides on two rails, like railroad tracks, which extend from the shoreline out into the lake. The rails also extend above the shoreline. A two-way electric winch is located at the shore end of the tracks, and two aircraft cables connect the cradle to the winch such that when the winch is activated, it can move the cradle in either direction, to either pull the boat out of the lake, or lower the boat into the lake. There are four tall corner posts, one on each corner of the cradle, and the boat is secured to the cradle by ropes attached to the posts. The Shore Tracker system is manufactured in Nisswa, and both Harlan Fierstine and Joe Phelps visited the manufacturing facility to inspect the system.

27. The Shore Tracker system requires reasonably calm water to easily "land" a boat, because the boat must be secured to the corner posts of the cradle before the winch is activated. If the wave action is as severe as in Exhibit 21B, for example (the "good walleye chop"), it would be difficult to secure the boat to the cradle before activating the winch. But it could be done. The boat would rub some against the poles, but the poles could be carpeted to avoid damaging the boats. The Shore Tracker system would work fine in a bay, or on days when there was not much wind. The record contains a videotape, Ex. 32, produced by the manufacturer of the Shore Tracker. That videotape demonstrates the kind of water which the manufacturer chooses to advertise the system. It is very calm. But a Shore Tracker system would be a viable alternative for some of the Phelps' boats.

28. In addition to the problem with wave action, the Shore Tracker system requires a reasonably smooth land surface for the rails to rest upon. There are two parallel rails, just like railroad rails. The cradle rides on those two rails. The distance between the two rails (five feet) must be maintained to close tolerance or else one of the cradle wheels will slip off or malfunction. In addition, there are limits as to how steep the gradient can be when moving from the lake to the shore. These two limitations, as a practical matter, would force the Phelps to use the swimming beach, or the area close to the swimming beach, for the Shore Trackers. While the beach itself could accommodate one or two of them without much problem, it could not accommodate four or five and still be available for swimming. The Phelps would have to use some of the gentler sloping land just east of the beach if they were to try to install four or five tracking systems. This land has large rocks and boulders which would create difficulties for installing the tracks. Dr. Dunlevy was also concerned that young children would hurt themselves climbing around on the rails and cables if they had to swim amidst them and the Administrative Law Judge finds this concern to be a credible one, but it is not an absolute bar to the use of the Shore Tracker system. It requires extreme caution prior to activating the winch. This safety concern does reduce the attractiveness of the system.

29. There are a number of existing harbors near the Phelps, and the Department suggested that it might be possible for the Phelps to find space in one of them instead of building another harbor. The Phelps explored this possibility (Paul Phelps did lease one spot in an adjoining harbor last summer), but were unsuccessful in finding a nearby harbor that would lease even one space for the current season, let alone five. The Phelps neighbor immediately to the east has a harbor which has some room in it, but which is in need of repairs. Dr. Dunlevy offered to pay for the repairs in order to rent some spaces there, but the neighbor refused.

30. It will always be possible to find space in a harbor to ride out a storm for a couple of hours. It is a matter of common courtesy among boaters in Leech Lake to allow others to come into harbors for short periods of time. However, the Administrative Law Judge concludes that there are no harbors nearby which will lease space to the Phelps. Using existing harbors is not a viable option.

31. There was also discussion of boat lifts at the hearing, although the Department did not advocate them as seriously as the Shore Tracker proposal. Boat lifts have been used on Leech Lake, including the south shore, for many years. They

suffer from many of the same disadvantages as the Shore Tracker systems, in that if the wave action is too strong, it is hard to get a boat in and out of a lift without damaging either the boat or the lift. In addition, they are not very aesthetically pleasing, and they require a lot of work during annual dismembering and re-erection. Nonetheless, they offer the advantage of using electric or other mechanical means to accomplish what can no longer be accomplished by brute force. Five boat lifts are theoretically possible in the Phelps situation, but as a practical matter, they probably would not erect more than two or three because they find them aesthetically obtrusive.

32. Another alternative is offshore moorage. This is not practical for more than one or two boats, because of the very substantial distances needed between them. In order to serve the purpose, there must be some way to get from the shoreline to the offshore moorage, which raises the same problems as just storing the boats on shore in the first place. The Phelps' dock is 50 feet out into the lake. The depth at the end is 4.5 to 5 feet. That would not be adequate depth for a sailboat in rough weather, so the mooring would have to be 60-70 feet from shore. During the hearing, Fierstine admitted that he only thinks of offshore moorage as a viable alternative for a sailboat. The Administrative Law Judge agrees with that. Although it is inconvenient, offshore moorage for one sailboat is a viable alternative.

33. A final alternative would be the "combination" alternative, whereby the Phelps would install a mix of Shore Tracker systems, boat lifts and offshore moorage. The Phelps would have the flexibility to determine the blend of alternatives which best fits their particular situation. A "combination" alternative is less aesthetically attractive than a harbor, and it will not satisfy the desire to easily launch and land boats in rough waves. However, a combination of Shore Tracker, boat lifts and offshore moorage is a reasonable alternative to a harbor.

Other Factors: Department's History of Prior Approvals

34. There is no complete history of permit applications and Departmental actions for all of the harbors on Leech Lake. Computerized tracking of applications began in the mid-1980s. While no person has done an exhaustive search of all of the Department's pre-computerized files, it does appear that the Phelps' application is the first outright denial for a new harbor since at least 1985. There have been a number of situations where harbors have had to be downsized in order to obtain Department approval, but the Phelps' application was the first new harbor application totally denied. Since then, there has been another denial -- a Robert Kroenig.

35. There is no evidence in the record to suggest that there has been any sort of harbor "moratorium" for Leech Lake the way there was for Lake Mille Lacs in the 1980s. However, approximately a month before the letter of denial was actually sent to the Phelps, Nate Dalager commented on a draft of it, in a memo to the file, which contains the following language:

Harlan Fierstine feels that the cumulative impacts from harbors are adding up. There is also site-specific spawning habitat that would be destroyed by the proposal. It appears that the applicant has an alternative of a boat tracking system, as outlined and supported in the denial letter. This denial will help make decisions in the future

on Leech Lake, as it clearly shows that harbors will not be allowed where there are impacts and alternatives, regardless of the apparent need for a harbor or what has been done in the past.

APPLICABLE STATUTES AND RULES

Minn. Stat. § 116D.04, subd. 6 (1994) provides, in relevant part, as follows:

No . . . permit for natural resources management and development [shall] be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction.

Minn. Stat. § 116B.02, subd. 5 defines "pollution, impairment or destruction" as [violation of a rule] or "any conduct which materially adversely affects or is likely to materially adversely affect the environment".

Minn. Rule pt. 6115.0200, subp. (1) provides, in relevant part, as follows:

It is the goal of the department to limit the excavation of materials from the beds of protected waters in order to:

A. preserve the natural character of protected waters and their shore lands, in order to minimize encroachment, change or damage to the environment, particularly the ecosystem of the waters;

Minn. Rule pt. 6115.0200, subp. 3 provides, in relevant part, as follows:

C. Where the proposed excavation will be detrimental to significant fish and wildlife habitat, or protected vegetation and there are no feasible, practical, or ecologically acceptable means to mitigate the effects;

Minn. Rule pt. 6115.0200, subp. 5(C) provides as follows:

The proposed project must represent the "minimal impact" solution to a specific need with respect to all other reasonable alternatives.

Minn. Rule pt. 6115.0201, subp. 5C provides as follows:

Excavations for development of private inland harbors or boat slips serving fewer than 25 watercraft or watercraft less than 20 feet in length shall be limited to those waters where:

(1) prevalent wind, wave, or current conditions along the shoreline where excavation is proposed are of a magnitude and frequency which precludes the use and maintenance of docks to

moor watercraft. Determinations of magnitude and frequency which would inhibit the use of docks shall be based on supporting facts including:

(a) the character of the water involved and its shoreline in relation to exposure to severe wind, wave, or current actions and the configuration and area of the water;

(b) the frequency of occurrence of storms producing severe winds and waves based on climatological data for the area; and

(c) the average number of days during each month of the navigational season when the shoreline is affected by severe winds, waves, or currents;

(2) the presence of lake bed and bank conditions would preclude the use and maintenance of docks and the conditions of the site and the number, type, or size of watercraft intended to be moored would preclude the development and use of on-land facilities, such as rollers, winch and track systems, sliderails, or other facilities which could be used to haul watercraft out of the water for on-land storage; or

(3) the proposed site is located in an area of the water body where offshore mooring or excavations or extensive dock development would create unreasonable obstructions to public use and navigation of the water body.

Based upon the foregoing, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Natural Resources have jurisdiction over the permit application herein.

2. All relevant substantive and procedural requires of law and rule have been fulfilled.

3. Leech Lake is a public water as that term is used in Minn. Stat. ch. 103G.

4. The proposed "all-in" harbor will not be detrimental to significant fish and wildlife habitat or protected vegetation. The destruction of 20 feet of shoreline is de minimus, and the addition of 4200 square feet of "quiet water" is similarly de minimus. See, Memorandum attached hereto.

5. The proposed project represents the minimal impact solution to the Phelps' need with respect to all other reasonable alternatives, including the "combination alternative".

6. The proposed project will not "materially adversely affect the environment" within the meaning of Minn. Stat. § 116B.02, subd. 5 (1994). Therefore, it will not cause

"pollution, impairment or destruction" of natural resources within the meaning of Minn. Stat. § 116D.04, subd. 6.

7. The proposed project complies with all other applicable statutes and rules.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner GRANT a permit for the construction of a "all-in" harbor.

Dated this _____ of May, 1996.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded: No Transcript Prepared

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

There are two separate sets of standards which govern the Commissioner's decision on this permit application. The first set is contained in the State's water laws and the Department's rules. These are Ch. 103G and Pt. 6115. The second set is contained in the Minnesota Environmental Rights Act and the Minnesota Environmental Policy Act, Chs. 116B and 116D, and the cases decided under them. Before the Commissioner can grant a permit, the project must pass muster under both sets of standards. In this case, the proposal does pass both tests.

With regard to the first set of standards, those of the Department's statute and rules, the facts do not support concerns about the harbor's impact on either spawning grounds or "quiet water". In both cases, the size of this harbor is minuscule in comparison to the natural features in the lake for both spawning and quiet water. As the court said long ago in State v. Kulvar, 266 Minn. 408, 123 N.W.2d 699, 705 (1963):

Clearly, the legislature did not intend that every change apparent in a cross-section view of the waters or every act of excavating or filling be prohibited, for such a construction could result in absurd

application. As suggested by defendant, many acts which would technically result in a change in the cross-section view are so minimal as to be of no significance to the public interest. Surely, there could also be changes which, although significant in physical effect, would enhance rather than harm the public interest. As provided in § 105.45, enumerating the standards which would justify the commissioner in refusing to permit a change in the cross-section of a lake in a case such as the one before us, must be found to be "wasteful" or "dangerous" or, above all, "detrimental to the public interest." The broad interest of the public in the beneficial use of the numerous and varied lakes of Minnesota does not lend itself to cataloging the countless ways in which any particular interference with public waters may be detrimental to public use and enjoyment. The standard must necessarily be broad and rest upon the application of judgment to a given set of facts.

In finding that the impact on the walleye spawning habitat and the creation of quiet water arising from the Phelps' harbor is so small as to be de minimus, the Administrative Law Judge recognizes that the primary basis for the Department's denial was the "cumulative effect" of the Phelps' harbor, along with the many others that have been built in the past, and may be built in the future. In support of this concern, the Department presented the Mille Lacs study, which shows that there is, indeed, a difference between the kind of fish that spawn and thrive in quiet waters as opposed to rough waters. As noted in the Findings, however, that study merely notes a concern that too many harbors may harm the walleye population, without any attempt to evaluate how many harbors are too many. Moreover, recent walleye populations in Leech Lake have been healthy and total harvest has remained virtually unchanged since the mid-60s, despite substantial increases in angling pressure. It would appear, therefore, that the existing harbors have not been driving down the walleye population.

The Department's rules focus on the impact of the particular project under consideration, and do not focus on the cumulative effects of multiple unrelated projects. For this reason, the Administrative Law Judge has focused upon the impact of this particular project, and not upon the cumulative effect. The Department may wish to consider adding some rules that would allow consideration of cumulative effects in future rule revisions. For example, rules of the Environmental Quality Board (see, Minn. Rule pt. 4410.0200, subp. 11). provide a basis for the Board to consider not only the impact of a particular project, but also the cumulative impacts of unrelated projects. Other agencies have similar rules.

With regard to the general environmental statutes, in order to invoke their protections, it must first be shown that that protectable natural resources will be "polluted, impaired, or destroyed". Both the spawning habitat and the walleye population are protectable resources, but the harbor's construction does not constitute

pollution, impairment or destruction because it will not violate any rules, nor will it "materially adversely affect the environment."

In some cases, it has been easy to show a material adverse effect on the environment. See, for example, County of Freeborn, by Tuveson v. Bryson, 210 N.W.2d 290 (1973) or In re City of White Bear Lake, 247 N.W.2d 901 (1976) or Urban Council on Mobility v. Minnesota Department of Natural Resources, 289 N.W.2d 729 (1980). In those cases, the impact of building a road or highway across a wetland or a lake were obviously material and adverse.

In other cases, however, it has not been so easy to demonstrate material environmental impairment. For example, in State, by Skeie v. Minnkota Power Co-op, Inc., 281 N.W.2d 372 (1979), the Supreme Court affirmed a trial court holding that Skeie had failed to demonstrate a material adverse effect when he only demonstrated that the use of his cultivated fields would be made more difficult because of the presence of a proposed power line. He did not show that the power line would make the soil sterile, or cause it to erode, or ruin its cropping potential in a significant and irreversible way. Skeie did show some permanent, but minor, impacts, but the court dismissed them because the law requires that the adverse impacts be "material".

In the Phelps case, the impacts of the proposed harbor are not material, in any reasonable sense of the word "material". The same logic that applied in the Skeie case applies to the Phelps case, and thus the general environmental statutes do not prevent the granting of a permit.

The cumulative effects argument has a greater chance of success under the general environmental laws than it does under the current versions of the Department's statutes and rules. However, even under the broader environmental laws, there must be some factual or scientific evidence to support a generalized "concern" that the walleyes will be harmed by the competitors. For example, there is a lot of data on Leech Lake fish population in the Large Lake Sampling Reports. It might be possible to prepare an analysis showing an increase in "bad" fish populations and a decrease in "good" fish populations. That analysis, coupled with the Hugill Report, would be persuasive. But without such factual data and analysis, all that remains is a "concern" that cannot be given much weight.

The Administrative Law Judge is well aware of the problems of protecting the environment in the face of incomplete data that reflects uncertainty. Our Supreme Court has followed the lead of the federal courts in not requiring a "body count of dead persons" before allowing government to take protective action to prevent environmental threats. See, Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (1984) and cases cited therein. But fairness does require some factual basis for governmental action. That was not present here, and thus the cumulative effects theory did not prevail.

AWK